No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - Petitioner,

versus

ROBERTS & SCHAEFER COMPANY - - - - - - Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a district court may stay the exercise of jurisdiction in a federal diversity action in deference to a first-filed parallel state action where the stay avoids multiplicity of judicial time, effort and piecemeal litigation, the federal action concerns only issues of state law, and the state court is an adequate forum to protect the rights of the litigants.

PARTIES BEFORE THE COURT OF APPEALS

The parties before the U. S. Court of Appeals for the Sixth Circuit were Roberts & Schaefer Company, a Delaware corporation, Plaintiff-Appellant, versus Lake Coal Company, Inc., a Kentucky corporation, Defendant-Appellee.*

*The list of the parent corporation and corporate subsidiaries and affiliates of the Petitioner, required by Rule 28.1, Rules of the Supreme Court of the United States, is set forth in the Petition For Writ of Certiorari, at p. ii.

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No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - *Petitioner,*

v.

ROBERTS & SCHAEFER COMPANY - - - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The judgment of the U. S. Court of Appeals For the Sixth Circuit in Roberts & Schaefer Company v. Lake Coal Company, Inc., is not reported. (Pet. App. B, at 1-5). The Order of the Sixth Circuit denying rehearing is not reported. (J.A. at 108). The Opinion of the District Court was not reported. (Pet. App. A, at 1).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 20, 1984. The Petition For Rehearing was denied on December 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petition for Writ of Certiorari was docketed on January 30, 1985, and certiorari was granted on March 25, 1985.

STATEMENT OF THE CASE

On September 14, 1981, the parties herein entered into a written contract for Roberts & Schaefer Company (hereinafter R&S) to construct a closed-circuit coal washing facility for Lake Coal Company, Inc. (hereinafter Lake) in Letcher County, Kentucky. Prior to the date of contract, construction was begun on the facility by Langley & Morgan Corporation and/or Darby Construction Company, Kentucky corporations and wholly owned subsidiaries of Elgin National Industries, Inc., the parent corporation of R&S. The facility was to be completed no later than April 1, 1982. However, due to negligence on the part of R&S and Elgin National Industries, Inc., in the design of the facility, and negligence, concealment, misrepresentation and fraud, or breach of duties or contract on the part of R&S, Elgin, Langley & Morgan and/or Darby in the construction and installation of the facility, it failed to operate, initially due to cracking and total loss of water from the large concrete static thickener used for clarifying the plant water. The facility has only recently been made operational through the efforts of Lake alone.

On November 12, 1982, Lake filed its complaint in state court, Lake Coal Co., Inc. v. Roberts & Schaefer Company, Elgin National Industries, Inc., Darby Construction Company and Langley & Morgan Corporation, Civil Action No. 82-CI-414, alleging alternative causes of action for: breach of contract; negligent design, construction and installation of the facility; mis-

representation, concealment and fraud; and, breach of expressed and implied warranties. On December 1, 1982, R&S and Elgin filed a petition for removal with the United States District Court for the Eastern District of Kentucky alleging that the domestic subcontractors were fraudulently joined in the state action solely to defeat federal diversity jurisdiction because Lake did not have a valid cause of action against the subcontractors under Kentucky law. The action was docketed. On December 23, 1982, Lake filed a motion to remand the removed action to state court and the issue of the validity of Lake's cause of action under Kentucky law against Darby and Langley & Morgan was exhaustively briefed and argued. On February 15, 1983, the district court found that the domestic subcontractors were not fraudulently joined and remanded the action to state court.

Having failed in its efforts to remove this action to federal court, R&S filed a complaint against Lake in the United States District Court for the Eastern District of Kentucky on April 6, 1983. In order to obtain diversity jurisdiction, the complaint omitted as parties the domestic subcontractors, Langley & Morgan and Darby. The complaint, a duplication of R&S's counterclaim in the state court action, was filed as a defensive tactic to encumber Lake with duplicative litigation and to disrupt the litigation proceedings in the state court.

On April 29, 1983, Lake filed a motion to dismiss or stay the federal action. In the numerous briefs filed in support of its motion and in reply to the re-

sponses of R&S, Lake, recognizing that it had the burden or persuasion on the motion, set out the exceptional circumstances which counselled against exercise of federal jurisdiction. The application of the balancing test in *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800 (1976), and this Court's rulings in *Brillhart* v. *Excess Insurance Company,* 316 U.S. 491 (1942), *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 655 (1978), and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation,* 460 U. S. 1 (1983), were exhaustively briefed and argued.

On July 15, 1983, the district court entered its order stating:

> "in the interest of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal [sic] litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court." (Pet. App. A, at 1).

The district court's order was appealed to the Court of Appeals for the Sixth Circuit by R&S. After docketing, R&S filed a motion for summary reversal, arguing that the district court had abused its discretion in allocating the burden of persuasion on the motion to R&S. (J.A., at 81). On November 3, 1983, this motion was denied.[1] However, after briefing and oral

[1]Jones, Krupansky and Wellford, Circuit Judges, comprised the panel.

arguments by the parties, on November 20, 1983, the Court of Appeals entered its judgment finding that the district court had in fact erred in allocating the burden of persuasion requiring "R&S to show good cause why concurrent jurisdiction should be exercised" and that "exceptional circumstances" counselling against exercise of federal jurisdiction do not exist in this case. (Pet. App. B, at 3-4). Additionally, the Court of Appeals found that the stay did not avoid piecemeal litigation because Lake failed to show "that it had an arguably valid claim under Kentucky law against the non-signatory subcontractors." (Pet. App. B, at 4). The appellate court therefore, reversed and remanded the action to the district court with directions to exercise jurisdiction.[2]

On December 21, 1984, a timely petition for rehearing was denied. (J.A., at 108). However, on January 4, 1984, upon motion of Lake, the Court of Appeals entered an order staying its mandate for thirty (30) days pending application for writ of certiorari to the Supreme Court. (Pet. App. C, at 1).

On January 30, 1985, Lake filed its petition for writ of certiorari in this Court. On March 7, 1985, R&S filed a motion to dissolve stay of issuance of mandate with the Circuit Justice. However, the motion was denied. The petition for writ of certiorari was granted on March 25, 1985.

[2]Keith, Contie, Circuit Judges, and Peck, Senior Circuit Judge, comprised the panel.

SUMMARY OF ARGUMENT

The district courts have inherent discretionary power to stay proceedings. In *Colorado River Water Conservation District* v. *United States, supra,* this Court held that a district court, in exercise of this power, may dismiss a federal action in deference to a parallel state action where wise judicial administration, giving regard to conservation of judicial resources and comprehensive litigation, so required. In applying this "balancing test" the district court properly held that exceptional circumstances existed herein which counselled against exercise of federal jurisdiction. Specifically, the district court stated that the stay was entered in fairness to all parties and to avoid multiplicity of judicial time and effort and piecemeal litigation. In addition to the reasons stated by the court, deference to the state action was appropriate because state law provided the rule of decision on the merits, there was *no* federal policy regarding the specific case which required exercise of jurisdiction, the state court was an adequate vehicle to protect the rights of the litigants and the state action was first filed and has now progressed further than the federal action.

In reversing the stay, the Sixth Circuit overlooked the specific basis for the district court's stay order, and substituted its judgment for that of the district court. The decision of the Sixth Circuit overrides the discretion of the district court as recognized by this Court in *Colorado River Water Conservation District* v. *United States, supra, Brillhart* v. *Excess Insurance Company,*

supra, Will v. *Calvert Fire Insurance Company, supra,* and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* and impairs the efficient implementation of judicial resources. Moreover, it requires a piecemeal adjudication of the issues raised in the federal and state court actions, contrary to this Court's holding in *Colorado River Conservation District* v. *United States, supra.*

Therefore, the opinion of the appellate court should be reversed and the district court's stay order reinstated.

ARGUMENT

The District Court, Through Its Inherent Power to Control Its Own Docket, May Dismiss or Stay Exercise of Jurisdiction in Deference to a Concurrent State Action Where Exceptional Circumstances Exist.

Diversity jurisdiction is not an absolute right. 28 U.S.C. §1332 grants only a statutory privilege of access to a federal court. *Brillhart* v. *Excess Insurance Company, supra.* Although the Supreme Court has stated that a district court, with proper subject matter jurisdiction, has a "virtually unflagging obligation" to exercise jurisdiction, it has nonetheless recognized that under the proper circumstances a district court, through its inherent power, may stay or dismiss proceedings pending adjudication of a concurrent action in state court. *Landis* v. *North American Company,* 299 U.S. 248 (1936). Recent Supreme Court decisions have held that exercise of this inherent power is not only proper under the abstention doctrine, but may also be properly exercised when considerations of "wise judicial administration giving regard to conser-

vation of judicial resources"[3] and comprehensive litigation so require. *Colorado River Water Conservation District* v. *United States, supra.*

Rather than prescribe a hard and fast rule to govern the district court, the Supreme Court has enumerated factors counselling against exercise of jurisdiction, which are to be balanced against the obligation to exercise jurisdiction: inconvenience of the federal forum, desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. Id. at 1818. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp., supra,* this Court added two additional factors to be considered: the forum which provides the rule of decision on the merits, and, whether the state court proceedings are inadequate to protect the litigants' rights. Id. at 15-29. The balancing of these factors has been left to the broad discretion of the district court. In *Will* v. *Calvert Fire Insurance Company, supra,* at 665, Mr. Justice Rheinquist's, plurality opinion stated:

> "there are sound reasons for our reiteration of the rule that a district court's decision to defer proceedings because of concurrent state litigation is generally committed to the discretion of the Court. No one can seriously contend that a busy federal

[3]The Seventh Circuit Court of Appeals has recently stated that although the pendency of an action in state court alone is not a bar to a concurrent federal action, such parellel actions may lead to a "grand waste of effort by both the courts and the parties." *Illinois Bell Telephone Company* v. *Illinois Com'n,* 740 F. 2d 566 (7th Cir. 1984); *Microsoftware Computer Systems* v. *Ontel Corp.,* 686 F. 2d 531 (7th Cir. 1982).

> trial judge, confronted both with competing demands on his time for matters properly within the jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties and witnesses, is not entrusted with a wide latitude in setting his own calendar."

Factors Counselling Against Exercise of Jurisdiction

There are four factors present in the case at bar which, when balanced against the district court's obligation to exercise jurisdiction, counsel against exercise of jurisdiction, as correctly held by the district court below: 1) avoidance of piecemeal litigation; 2) state law provides the rule of decision on the merits; 3) the state court is adequate to protect the rights of the litigants; and, 4) priority of filing.

Avoidance of Piecemeal Litigation

In the present case, all of the parties in the federal action are included in the state action; some parties included in the state action, however, are omitted in the federal action. Likewise, the issues in the state action are broader and more inclusive than those in the federal action and the allegations in the federal action are included in the issues presented for adjudication in the state action. The district court, correctly applying the balancing test set out in *Colorado River Water Conservation District* v. *United States, supra,* recognized that the presence of these factors counselled against exercise of jurisdiction and therefore held that in fairness to all parties and to avoid piecemeal litigation and duplicative judicial time and effort the federal action should be stayed.

However, the United States Court of Appeals speculated that piecemeal litigation might not be avoided by the stay of federal jurisdiction because R&S could file a separate action in the state courts against the subcontractors if held liable to Lake for damages. Also, the Court found that Lake had not shown that it had an arguably valid claim under Kentucky law against the subcontractors in the state action.

Lake respectfully contends that the appellate court, in so finding, overlooked the fact that the state action was more inclusive of parties and issues than the federal action because of its preoccupation with an imagined possible future action by R&S against the domestic subcontractors, its sibling corporations. Imaginary cases do not affect the actual circumstances that piecemeal litigation is avoided in the instant case by stay of the federal suit. Moreover, it is most doubtful that R&S would file an action against its sibling corporations in state court, even if it is held liable to Lake for damages. That point is borne out by the fact that R&S has filed no cross-claim against its sibling corporations, co-defendants, in the state action.

If the federal action is not stayed and even if judgment is entered, it is fact, not speculation, that the parallel state action will nevertheless proceed against the subcontractors, Darby Construction Company and Langley & Morgan Corporation, and the parent corporation, Elgin National Industries, Inc., upon the same facts and law as in the instant case thereby requiring duplicative judicial time and resources. This is precisely the piecemeal litigation held proper for avoid-

ance by *Colorado River Water Conservation District* v. *United States, supra,* wherein this Court reversed the Seventh Circuit Court of Appeals and affirmed the district court's dismissal of the federal suit. Citing *Brillhart* v. *Excess Insurance Company, supra,* this Court held that the desirability of avoiding piecemeal litigation was an exceptional circumstance counselling against exercise of jurisdiction. The Court stated:

> "This policy is akin to that under lying the rule requiring that jurisdiction be yielded to the Court first acquiring control of property for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property." 424 U. S. 819.

Again, in *Arizona* v. *San Carlos Apache Tribe of Arizona,* — U. S. —, 103 S. Ct. 3201 (1984), the Court held that the conservation of state and federal judicial resources was an important factor counselling against exercise of federal jurisdiction.[4] Additionally, the Court therein warned:

> "since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first — a race . . . prejudicial, to say the

[4]Moreover, this Court has repeatedly frowned upon the procedural ploy of reactive litigation. See, *Will* v. *Calvert Fire Insurance Company, supra; Brillhart* v. *Excess Insurance Company, supra.*

least, to the possibility of reasoned decisionmaking by either forum." 103 S. Ct. at 3214.

In the present action, a determination of issues involving the design, installation and construction of the wash plant facility will be required in both the federal and state courts unless the federal action is stayed because the state action is more inclusive in parties thereto and issues therein. A judgment in the federal action resolves only one facet of the dispute leaving the remaining issues for adjudication by the state court. Lake respectfully contends that the stay of the federal action not only avoids such piecemeal adjudication of this case and thereby conserves state and federal judicial resources, but it, additionally, heeds this Court's warning in *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* and prevents a "destructive race" to judgment.

In *Reiter* v. *Universal Marion Corporation,* 173 F. Supp. 13 (D.C. 1959), a stockholder derivative action, the court stayed federal jurisdiction holding that piecemeal litigation of underlying disputes would result unless the concurrent federal action was stayed because all of the parties in the state court action were not before the federal court. Similarly, in *Brendle* v. *Smith,* 46 F. Supp. 522 (S.D. N.Y. 1942), the court stayed federal jurisdiction holding that piecemeal litigation would result unless the federal action were stayed because the state action was broader and more inclusive in regard to the parties thereto and the issues

therein. In *P.P.G. Industries, Inc.* v. *Continental Oil Company,* 478 F. 2d 674, 683 (5th Cir. 1973), the Fifth Circuit Court of Appeals faced with the very issue presented herein, stayed the federal action stating:

> "The advantages of obtaining in one suit or the other joinder of more parties affected by the controversy, even though they are not indispensible parties to the litigation, may be decisive in a given case."

In the case at bar, the stay of the federal action permits all issues arising out of the design, installation and construction of the wash plant facility to be determined between all parties in one action and thereby avoids piecemeal litigation and duplicative judicial time and effort. These exceptional circumstances counsel against exercise of jurisdiction.

The Court of Appeals failed to reach this conclusion because it misconceived that it was to determine whether Lake had a valid cause of action against the subcontractors in the state suit. In the first instance, the validity of Lake's claim under Kentucky law was not an issue presented on appeal to the Sixth Circuit. The issue presented for appeal was whether the district court had abused its discretion in granting the stay, not the merits of Lake's case in state court. There was no claim raised by R&S on appeal that Lake did not have an arguably valid claim against the subcontractors in the state action. Nor was there any discussion by any party of the relevant facts or applicable law whereby the appellate court could make a reasoned

determination of this issue.[5] Moreover, the Court of Appeals apparently overlooked the fact that the issue of the validity of Lake's cause of action against the subcontractors in the state claim was presented, exhaustively briefed, argued and decided by the district court in a separate removal action on motion to remand. The district court, in finding that the subcontractors were not fraudulently joined in the state action, necessarily determined that Lake had an arguably valid claim against them in the state court suit.

State Law Provides the Rule of Decision

The present federal action, based on diversity jurisdiction, concerns only application of state law and there is no federal policy regarding the specific case requiring exercise or stay of federal jurisdiction present. This factor also counsels against exercise of jurisdiction. In *Colorado River Water Conservation District* v. *United States, supra,* and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* the

[5]In its petition for reconsideration Lake cited, without discussion, the cases, briefed and argued to the district court, which demonstrate the validity of its claim against the subcontractors for negligence, concealment, misrepresentation and fraud and the status of Lake as an intended third party beneficiary of the contract between the subcontractors and R&S. The appellate court apparently overlooked these cases because of its preoccupation with the fact that the subcontractors were non-signatory to the September, 1981, contract between Lake & R&S. Lake respectively submits that it is not necessary for the subcontractors to be signatory to said contract in order to have an arguably valid claim against them, in one or more of the alternative causes of action set out in its complaint.

existence of federal policy counselling against or favoring exercise of jurisdiction was the primary factor in the Court's decision.

In *Colorado River Water Conservation District* v. *United States, supra,* this Court noted that the McCarran Act expressed a federal policy favoring the determination of water rights by state courts. Accordingly, this Court affirmed the district court's dismissal of the federal action in deference to the parallel state action. See, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company,* 460 U. S. at 23, footnote 29. Similarly, in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* this Court noted that the Arbitration Act expressed a federal policy requiring that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." 460 U. S. at 24-25. It stated that the "presence of federal-law issues must always be a major consideration weighing against surrender" of jurisdiction. *Id.* at 25. Because this Court found "that there was substantial doubt" that the construction company could obtain an order compelling arbitration in the state court, it reversed the district court's stay order and remanded the action with instructions to exercise jurisdiction thereby carrying out the federal policy promoting arbitration of disputes.

In *Tai Ping Insurance Co. LTD* v. *M/V Warschau,* 731 F. 2d 1141 (5th Cir. 1984), the Fifth Circuit Court of Appeals held that this Court's essential concern in *Moses H. Cone Memorial Hospital* v. *Mercury Con-*

struction Company, supra, was not the exercise of federal jurisdiction but rather that the intent of the federal law not to delay arbitration required exercise of jurisdiction therein. See also, *Southland Corp.* v. *Keating,* — U. S. —, 194 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

In the case at bar there are no issues of federal law, nor is there an expressed federal policy requiring exercise of jurisdiction. Lake respectfully contends that these unique factors are significant and counsel against exercise of federal jurisdiction.

Although this Court has not previously ruled on a case based on diversity jurisdiction where there is no federal policy regarding the specific case requiring exercise or stay of jurisdiction, this Court has noted the importance of these factors. In *Brillhart* v. *Excess Insurance Company, supra,* this Court stated that ordinarily it is uneconomical and vexatious to proceed with the exercise of federal jurisdiction where a concurrent action is pending in the state court and the federal action is governed by state law.[6] *Id.* at 495.

Furthermore, in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* the Court indicated that, although rare, the presence of state law issues may weigh in favor of the surrender of jurisdiction to the state court. *Id.* at 25. Accord, *Gilbane Building Company* v. *The Nemours Foundation,* 568 F. Supp. 1085 (D. Del. 1983).

[6]Although a declaratory judgment action, it is cited with approval in *Colorado River Water Conservation District* v. *United States, supra,* at 878, and *Will* v. *Calvert Fire Insurance Company, supra,* at 662.

Similarly, the Eleventh Circuit Court of Appeals stated that, in a federal diversity action, the presence of only state law would ordinarily "counsel deference to the state forum." *American Manufacturer's Mutual Insurance Company* v. *Edward D. Stone, Jr.,* 743 F. 2d 1519, 1524 (11th Cir. 1984).

It is not necessary for the state law to be unsettled in order for these factors to be significant, as the Sixth Circuit incorrectly held.[7] Rather, it is apparent that it is the state court's greater familiarity and greater expertise with state law in all instances which counsels against exercise of jurisdiction. See, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra.*[8] Lake therefore, respectfully contends that this factor weighs in favor of the stay of the federal action.

State Court Is an Adequate Vehicle

Since the federal action is based on diversity jurisdiction and Kenutcky law must be applied, it is apparent that the state courts of Kentucky afford an

[7]If the state law was unsettled, then the stay would have been appropriate under the doctrine of abstention. *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25 (1959). See also, *Colorado River Water Conservtion District* v. *United States, supra,* at 814-815.

[8]Therein, this Court noted that the federal policy favoring determination of water rights by state courts was due in part to Congress' judgment that "the field of water rights is one peculiarly appropriate for comprehensive treatment *in the forum having the greatest expertise assisted by state administrative officers acting under state courts.* (emphasis added). 460 U. S. at 20.

adequate forum for this action. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* the Court found that the state action was inadequate to protect the rights of the plaintiff because the decisions in prior state supreme court cases raised a reasonable doubt that the state court would enter an order compelling the plaintiff to arbitrate, which was a primary remedy sought by the plaintiff in the federal action. Unlike *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* there are no remedies available to R&S in the federal action which are not also available in the state action.

Priority of Filing

The state action was filed in November, 1982, some five months prior to the filing of the federal action. Its priority in filing counsels against exercise of jurisdiction under the circumstances herein. See, *Colorado River Water Conservation District* v. *United States, supra.* Certainly, the Petitioner does not suggest that this Court give too mechanical a reading to the chronology of filing. This Court plainly held that priority should not be measured exclusively by which complaint was filed first but rather in terms of how much progress has been made in the two actions. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra.* At the time the stay order was entered in the district court, the first-filed state action had proceeded no further toward resolution than the federal

action due primarily to R&S's actions in attempting to wrongfully remove the suit from state court.[9]

However, since that time the state action has progressed in its natural course so that discovery is near completion and the trial of the matter is scheduled for September 2, 1985. The Seventh and Ninth Circuits have held that if "the progress of the state suit has changed significantly . . . it would defeat that purpose . . . [of the *Colorado River* doctrine] . . . to ignore the subsequent events," *Illinois Bell Telephone Company* v. *Illinois Commerce Com'n, supra,* at 570; *United States* v. *Adair,* 723 F. 2d 1394 (9th Cir. 1983), cert. denied, — U. S. —, 104 S. Ct. 3536 (1984). Therefore, the chronological order of filing and the further progress of the state action certainly counsels against exercise of jurisdiction herein.

The Sixth Circuit Opinion

The Sixth Circuit held:

> "the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal."

Lake respectfully contends that the Sixth Circuit overlooked the specific language of the district court's stay

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[9]Moreover, the Court should note that R&S propounded interrogatories and a request for production of documents in the federal action simultaneously with the service of its complaint so as to place itself in a posture to argue that the progress of the concurrent action was similar.

order which set out the court's rationale for the stay as follows:

> "It is hereby ordered, that in the interest of fairness to all concerned, as well as to avoid multiplicity of judicial time and effort, and piecemeal litigation, this action is now stayed . . . ." (Appendix p. 6a).

It is clear that the district court ruled that the avoidance of piecemeal litigation counselled against exercise of jurisdiction in this case and that no countervailing reasons requiring exercise of jurisdiction had been shown to exist by R&S. The district court's reference to fairness to all parties concerned indicates that the district court considered whether countervailing reasons existed requiring exercise of jurisdiction even after Lake demonstrated that exceptional circumstances, counselling against exercise of jurisdiction, existed.

The Court of Appeals ignored the district court's rationale and seized upon the language in the order which did not pertain to the allocation of the burden of proof.[10] The district court's statement, upon which the appellate court based its finding, is similar to that employed by the Fifth Circuit in *P.P.G. Industries, Inc.* v. *Continental Oil Company, supra,* at 6. Therein, the Court, after concluding that exceptional circumstances counselling against exercise of jurisdiction, existed, further stated:

[10]The district court also stated "no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems." [Pet. App. A at (1)]

> "nothing has come to the attention of this Court, which would indicate a stay would be unfair to P.P.G." Id. at 683.

Similarly, in *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company,* 600 F. 2d 1228 (7th Cir. 1979), the court stated:

> "Preventing a vexatious suit is similar to the interest in avoiding piecemeal litigation mentioned in *Colorado River, supra,* at 818, and would clearly justify federal deferral to the parallel state proceeding *unless there exists strong countervailing reasons* for the federal court to decide the federal suit without further delay such as prejudice to Calvert of compelling policy reasons to secure an immediate federal court decision." (emphasis added). Id. at 1234.

Even in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp., supra,* this Court noted that not only had the hospital failed to demonstrate the existence of exceptional circumstances counselling against exercise of jurisdiction, but that the construction company had also shown countervailing factors indicating that federal jurisdiction should be exercised without delay.

In the case at bar, R&S raised no indication that countervailing factors exist requiring exercise of jurisdiction without delay even though Lake had demonstrated that exceptional circumstances which counselled against that exercise did exist. Instead, R&S only argued that it had an absolute right to a federal forum.

The record demonstrates that the district court assigned the burden or persuasion to Lake. It properly applied the "balancing test" in *Colorado River Water Conservation District* v. *United States, supra,* and, in its discretion, concluded that "in the interest of fairness to all parties concerned as well as to avoid multiplicity of judicial time and effort and piecemeal litigation" the federal action should be stayed.

CONCLUSION

Over the past few years there has been a dramatic increase in the number of diversity cases filed with the United States district courts. See, *1981 Anuual Report of the Director of the Administrative Office of the United States Courts,* at 4. Perhaps recognizing this, the Court in *Colorado River Water Conservation District* v. *United States, supra,* held that federal actions may be dismissed in deference to parallel state actions when considerations of conservation of judicial resources and comprehensive litigation so require. The United States District Court for the Eastern District of Kentucky stayed the federal action herein in compliance with the *Colorado River* doctrine. The Sixth Circuit Court of Appeals' decision thwarts that doctrine and therefore, should not be permitted to stand. For the foregoing reasons, Lake prays that the judgment of the Sixth Circuit be reversed and the district court's order of stay be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff*,

v.

LAKE COAL COMPANY, INC., - - - *Defendant*.

ORDER—Filed July 15, 1983

The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justfy litigating these same issues simultaneously in two different judicial systems. The Court being so advised,

IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

This the 14th day of July, 1983.

(s) G. Wix Unthank
G. Wix Unthank, Judge

APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant,*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee.*

On Appeal From the United States District Court for the Eastern District of Kentucky

Filed November 20, 1984

BEFORE: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Roberts & Schaefer Company (R&S) appeals from a district court order staying proceedings in this diversity action pending the outcome of a concurrent state court action.[1] We reverse and remand with instructions for the district court to exercise jurisdiction.

In September 1981, the parties executed a written contract under which R&S would construct a coal washing plant for Lake Coal Company, Inc. (Lake) in Letcher County, Kentucky. R&S employed two subcontractors. On

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[1]The district court's order is appealable. *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, — U. S. —, 103 S. Ct. 927, 933-35 (1983).

November 12, 1982, Lake filed a complaint in state court against R&S and the subcontractors alleging breach of contract, negligent design, construction and installation, breach of warranties and fraud. R&S asserted a counterclaim for the contract price.

Although the presence of the subcontractors as parties destroyed complete diversity, R&S attempted to remove the action on the ground that the subcontractors had been joined as defendants solely for the purpose of defeating federal diversity jurisdiction. The district court disagreed with R&S and remanded the action to the state court because federal jurisdiction was absent.

R&S then filed this action against Lake, essentially pleading the counterclaim that it had filed in state court. The subcontractors were not joined. Lake answered and filed its counterclaim for breach of contract, negligence, breach of warranties and fraud. Lake then moved to dismiss or to stay this action, which now involves the same issues as the state court action. The district court stayed this action pending the outcome of the state court proceedings because "no good cause has been shown to justify litigating the same issues simultaneously in two different judicial systems" (App. at 294) and because fairness to the parties and the avoidance of multiplicitous and piecemeal litigation counseled against exercising concurrent jurisdiction.

The general rule is that the prior pendency of a state court action does not bar concurrent federal proceedings on the same matter. *See Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655, 662 (1978); *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 817 (1976). Indeed, federal courts have a "virtually unflaging obligation" to exercise their jurisdiction. *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, ___ U. S. ___,

103 S. Ct. 927, 936 (1983); *Colorado River Water*, 424 U. S. at 817. Nevertheless, a district court may sometimes decline to exercise jurisdiction where a state court action on the same issues is pending. The purpose of this limited exception to the duty to exercise jurisdiction is to conserve judicial resources and to promote comprehensive disposition of litigation. *See Colorado River Water*, 424 U. S. at 817. The exception is even narrower than the abstention doctrine. *Id.*, at 818.

In deciding whether or not to exercise jurisdiction in this type of case, a district court must determine whether there exist "exceptional circumstances" that justify not doing so. *See Moses H. Cone Hospital*, 103 S. Ct. at 942. Since "only the clearest of justifications," *Id.*; *Colorado River Water*, 424 U. S. at 819, will warrant a stay, the burden of persuasion is upon the party seeking the stay. Moreover, the parties agree that a district court must evaluate several factors, no one of which is determinative, in reaching its decision: (1) whether the state action is an action *in rem*, (2) whether the federal and state actions have progressed to the same stage,[2] (3) whether the federal forum is convenient, (4) whether the state proceedings are adequate; (5) whether the substantive claims involve federal or state law and (6) whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed.

We hold that the district court erred in assigning the burden of persuasion. Although the burden was upon Lake to show "exceptional circumstances" amounting to the "clearest of justifications" for not exercising federal juris-

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[2]The progress of the federal and state actions is more relevant than the times of filing of the respective complaints. *See Moses H. Cone Hospital*, 103 S. Ct. at 940.

diction, the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal.

Furthermore, we hold that "exceptional circumstances" do not exist in this case. First, the state court action is not an action *in rem*. Second, the federal and state actions have progressed to about the same stage of discovery. Third, the federal court is only about fifty-three miles from the construction site. Fourth, both the federal and state courts appear capable of adjudicating the parties' claims and affording appropriate relief. Thus, none of the first four factors enumerated above augurs in favor of staying the federal action pending the outcome of the state proceedings.

Fifth, although both the federal and state actions involve solely questions of state law, Lake has not demonstrated either that the state law issues are so difficult or that state law is so unsettled that state court expertise is required. Accordingly, the fifth factor listed above does not constitute an exceptional circumstance justifying a refusal to exercise federal jurisdiction.

The final factor is whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed. Lake contends that piecemeal litigation will result if the federal action is not stayed because the subcontractors, whom Lake sued in state court, are not parties to the federal action. Having reviewed the arguments and the record submitted by the parties, we hold that Lake has not shown either that piecemeal litigation likely will occur if the federal action is not stayed or likely will be avoided if the federal action is stayed.

As to the former point, it is noteworthy that the subcontractors are not parties to the September 1981 contract.

Moreover, Lake has not shown that it has an arguably valid claim under Kentucky law against the non-signatory subcontractors. In short, Lake has not shown that the absence of the subcontractors in the federal action will result in Lake filing a separate action against them. Moreover, piecemeal litigation could occur in the state courts in the form of a separate action by R&S against the subcontractors if R&S is held liable to Lake for damages. Hence, piecemeal litigation may not be avoidable even if the federal action is stayed.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to exercise jurisdiction.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellee,* [sic]

v.

LAKE COAL COMPANY, INC., - *Defendant-Appellant.* [sic]

ORDER—Filed January 4, 1985

Upon consideration of the appellee's motion to stay the mandate pending application for writ of certiorari,

It is ORDERED that the motion be and it hereby is granted and the mandate is stayed until February 4, 1985.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
John P. Hehman, Clerk